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Attorneys for Defendant  
STEPHEN MANGELSEN

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FLUKE ELECTRONICS  
CORPORATION, a Washington  
corporation,

Plaintff,

vs.

STEPHEN MANGELSEN, a California  
resident,

Defendant.

NO. C0-8-01188 JW

**NOTICE OF MOTION AND MOTION  
FOR MORE DEFINITE STATEMENT  
AND TO STRIKE SECOND CAUSE OF  
ACTION (RULE 12(e), 12(f))**

Date: Monday, June 9, 2008  
Time: 9:00 a.m.  
Room: 8, 4th Floor  
Judge: Hon. James Ware

**TO PLAINTIFF, FLUKE ELECTRONICS CORPORATION, AND TO ITS  
ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on Monday, June 9, 2008 at 9:00 a.m. or as soon thereafter as the matter may be heard, before the Honorable James Ware, in Courtroom 8, located on the 4th Floor, of the above captioned court, at 280 North First Street, San Jose, California 95113, Defendant STEPHEN MANGELSEN will move for an order compelling Plaintiff to make a more definite statement, to strike the Second Cause of Action of the Complaint, and to strike the Prayer for attorneys' fees.

This motion is made on the grounds that the First Cause of Action is too vague and ambiguous to allow Defendant to frame an appropriate response; that the Second Cause of Action is surplusage; and that Plaintiff has pleaded neither contract nor statute entitling

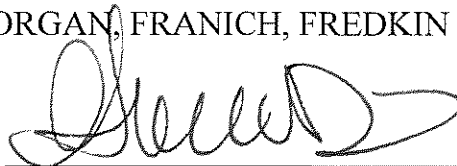
1 Plaintiff to recover attorneys' fees. The motion is made pursuant to Federal Rule of Civil  
2 Procedure, Rules 12(e) and 12(f).

3 This motion will be based on this Notice of Motion and Motion, the Memorandum of  
4 Points and Authorities filed herewith, and on such other oral and documentary evidence to be  
5 presented at the hearing.

6 Dated: April 28, 2008

MORGAN, FRANICH, FREDKIN & MARSH

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STEPHEN MANGELSEN, a California  
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NO. C0-8-01188 JW

**POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR MORE  
DEFINITE STATEMENT AND TO  
STRIKE SECOND CAUSE OF  
ACTION (RULE 12(e), 12(f))**

Date: Monday, June 9, 2008  
Time: 9:00 a.m.  
Room: 8, 4th Floor  
Judge: Hon. James Ware

**INTRODUCTION**

Defendant STEPHEN MANGELSEN brings this motion pursuant to Federal Rules of Civil Procedure, Rule 12(e), on the grounds that Plaintiff FLUKE ELECTRONICS CORPORATION's First Cause of Action for Breach of Contract is so vague and ambiguous that Defendant cannot frame a responsive pleading.

Defendant also moves pursuant to Federal Rules of Civil Procedure, Rule 12(f) to strike Plaintiff's Second Cause of Action for Declaratory Judgment on the grounds that the Second Cause of Action is unnecessary and inappropriate, as the controversy between the parties can be resolved by adjudication of Plaintiff's First Cause of Action for Breach of Contract. Plaintiff's prayer for attorneys' fees should also be stricken, as Plaintiff has failed to allege any basis for an award of such fees.

## THE PLEADING

Plaintiff's First Cause of Action alleges that the parties entered into a settlement agreement ("The Agreement") which required Defendant to pay a portion of the total settlement amount to Plaintiff. (Complaint, ¶12) It is not alleged whether the contract was written or oral.

Plaintiff alleges that Defendant refused to pay his share of the settlement amount. (¶14) The total amount is not identified, only Defendant's alleged proportion. The basis for calculating Defendant's proportion is not alleged.

Plaintiff alleges that Plaintiff performed all obligations owing under The Agreement. (¶15) The Complaint does not identify what these obligations were or what consideration Defendant received from Plaintiff in exchange for Defendant's alleged promise to pay.

Plaintiff alleges that it has been damaged in the sum of \$388,662.78 as a result of Defendant's alleged breach. (¶¶19-20) Plaintiff prays for general and consequential damages and attorneys' fees and costs. (Prayer, ¶1(c))

Plaintiff's Second Cause of Action for Declaratory Relief alleges that there is a controversy between the parties as to whether Defendant was required to make a payment pursuant to The Agreement. (¶25) Plaintiff requests that the Court declare the rights and responsibilities of the parties under The Agreement. (Prayer, ¶3)

## ARGUMENT

### **1. Plaintiff's First Cause Of Action Is Too Vague And Ambiguous To Permit Defendant To Frame A Response**

Federal Rules of Civil Procedure, Rule 12(e) provides that:

A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.

A 12(e) motion is appropriate where the defendant cannot ascertain the nature of the claim being stated. *Wood v. Apodaca* (N.D. Cal., 2005) 375 F.Supp.2d 942, 949-50 (holding the complaint so vague as to time that defendant could not ascertain the timeliness of the claims).

Plaintiff's First Cause of Action is vague and ambiguous as to the terms of The

1 Agreement which is sought to be enforced, in the following respects:

- 2 • The complaint fails to allege whether The Agreement is written or oral. (¶¶2,  
3 11-12) Defendant is unable to frame an appropriate response without  
4 knowledge as to whether the contract is written or oral.
- 5 • Plaintiff neither attaches the text of The Agreement nor sets forth its material  
6 terms. The only term alleged is that Defendant was to pay to Plaintiff 5.91963%  
7 of the total settlement amount, which is not identified. (¶12) Absent some  
8 allegation of the material terms of The Agreement, or a copy of The Agreement  
9 itself (if written, which is by no means made clear by the Complaint), Defendant  
10 cannot frame a proper response.

11 In addition to the foregoing issues, which render Defendant unable to frame an  
12 intelligible response, the Complaint suffers from the following lack of material details:

- 13 • The Complaint does not identify the consideration received by Defendant in  
14 exchange for this alleged agreement. Plaintiff alleges that Defendant received  
15 “three million dollars” in exchange for his shares of stock, but Plaintiff’s  
16 allegation at ¶9 makes it clear that the \$3 million was received by Defendant  
17 pursuant to a separate Merger Agreement, not through the settlement agreement  
18 that Plaintiffs are seeking to enforce. Plaintiff alleges that Defendant received  
19 “other consideration” for the settlement, but does not identify what that other  
20 consideration might be. (¶16)
- 21 • Plaintiff alleges that it performed its obligations under The Agreement, but does  
22 not identify what those obligations were. (¶15)

23 Because Plaintiff’s First Cause of Action is too vague and ambiguous as to the terms  
24 of the contract which is sought to be enforced, and Defendant is unable to frame an  
25 appropriate response, Defendant’s motion for a more definite statement should be granted.

## 26 **2. Plaintiff’s Second Cause of Action for Declaratory Relief Should Be** 27 **Stricken As Unnecessary**

28 Under Federal Rule of Civil Procedure, Rule 12(f), “[u]pon motion made by a party

1 before responding to a pleading ... the court may order stricken from any pleading any  
 2 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”  
 3 Plaintiff’s Second Cause of Action is redundant and should be stricken.

4 Plaintiff’s Second Cause of Action invokes the Declaratory Judgment Act, 28 U.S.C.A.  
 5 §2201, in seeking a declaration of the parties’ rights and responsibilities *vis-a-vis* The  
 6 Agreement. The Act provides that:

7 In a case of actual controversy within its jurisdiction, . . . any court of the United  
 8 States, upon the filing of an appropriate pleading, may declare the rights and  
 9 other legal relations of any interested party seeking such declaration, whether  
 or not further relief is or could be sought. Any such declaration shall have the  
 force and effect of a final judgment or decree and shall be reviewable as such.

10 28 U.S.C.A. §2201(a). Courts interpreting the Act have made it clear that the Act was  
 11 intended to adjudicate controversies, including parties’ contractual rights, *before actual harm*  
 12 *has occurred*. “The purpose of the Declaratory Judgment Act is to afford an added remedy  
 13 to one who is uncertain of his rights and who desires an early adjudication thereof without  
 14 having to wait until his adversary should decide to bring suit, and to act at his peril in the  
 15 interim.” *Shell Oil Co. v. Frusetta* (9th Cir. 1961) 290 F.2d 689, 692.

16 The Ninth Circuit has identified “two criteria for determining whether declaratory relief  
 17 is appropriate in a given case:(1) when the judgment will serve a useful purpose in clarifying  
 18 and settling the legal relations in issue, and (2) where it will terminate and afford relief from  
 19 the uncertainty, insecurity, and controversy giving rise to the proceeding.” *Central Montana*  
 20 *Elec. Power Co-Op, Inc. v. Administrator of Bonneville Power Admin.* (9th Cir. 1988) 840  
 21 F.2d 1472, 1475, fn. 1. In the case at bar, the requested declaratory relief serves neither  
 22 purpose; absent a ruling on Plaintiff’s First Cause of Action for breach of contract, a  
 23 declaratory judgment of the parties’ rights will not terminate and afford relief from the  
 24 “controversy” – Defendant’s alleged breach of contract – giving rise to this action. Plaintiff  
 25 will or will not obtain its desired relief through its breach of contract claim, not the declaratory  
 26 relief claim.

27 “When declaratory relief and another remedy are substantially similar, the court may  
 28 exercise its discretion to dismiss the declaratory judgment claim.” *The Pantry, Inc. v. Stop-N-*



1 *Go Foods, Inc.* (SD Ind. 1991) 777 F.Supp.713, 717. Like Plaintiff in the case at bar, in *The*  
 2 *Pantry*, the plaintiff brought causes of action for breach of contract and declaratory relief,  
 3 seeking monetary damages under the former and a declaration of the parties' rights and  
 4 obligations on the contract in the latter. The court held that "Plaintiff may prove its damages  
 5 as in any other breach of contract action . . . . Determination of the breach of contract claim  
 6 will sufficiently and effectively resolve the issues presented in this matter. *Id.* at 718. Citing  
 7 *Newton v. State Farm Fire & Casualty Co.* (E.D. Va. 1991) 138 F.R.D. 76, *The Pantry* court  
 8 noted that allowing a superfluous declaratory relief claim to "linger" was "unnecessary, would  
 9 not promote judicial economy, would confuse the issues at trial and promote piecemeal  
 10 consideration of the issues." 777 F.Supp. at 718. Thus, the declaratory relief claim was  
 11 "inappropriately raised" because the plaintiff would be fully compensated if it prevailed on the  
 12 breach of contract claim.

13 California courts follow the same reasoning. "[E]ven where jurisdiction to render a  
 14 declaratory judgment exists, a court may, in the exercise of its sound discretion, refuse to  
 15 render the decision sought if it is unnecessary to a practical solution of the controversy."  
 16 *Architectural Models, Inc. v. Neklason* (D.C. Cal. 1967) 264 F.Supp.312, 318. Plaintiff's  
 17 Second Cause of Action is not necessary and in itself will not solve the underlying controversy  
 18 between the parties. Defendant's motion to strike the Second Cause of Action should be  
 19 granted.

### 20 3. Plaintiff's Prayer for Attorneys' Fees Should Be Stricken

21 At paragraph 21 of the body of the Complaint, and at paragraph 1(c) of the Prayer for  
 22 Relief, Plaintiff alleges that it has incurred attorneys' fees, and prays for attorneys' fees,  
 23 respectively. A motion to strike may be directed at the prayer for relief where the damages  
 24 sought are not recoverable as a matter of law. *Bureeron v. Uvawas* (C.D. Cal. 1996) 922  
 25 F.Supp. 1450, 1479, fn. 34; *Wilkinson v. Butler* (E.D. Cal. 2005) 229 FRD 166, 172. Plaintiff  
 26 has not alleged any contractual or statutory basis for an award of attorneys' fees in this matter.  
 27 Plaintiff's prayer for attorneys' fees should be stricken, as Plaintiff has failed to allege any  
 28 facts which would entitle Plaintiff to recover attorneys' fees.

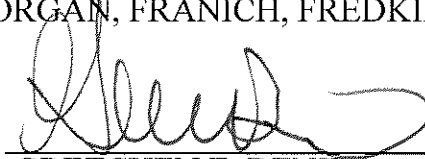
**CONCLUSION**

For all of the foregoing reasons, Defendant's motion for a more definite statement as to the First Cause of Action, and to strike the Second Cause of Action and Paragraph 3 of Plaintiff's Prayer For Relief, should be granted.

Dated: April 28, 2008

MORGAN, FRANICH, FREDKIN & MARSH

By



GRETCHEN E. DENT  
Attorneys for Defendant  
STEPHEN MANGELSEN



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NO. C0-8-01188 JW

**CERTIFICATE OF SERVICE BY MAIL**

Date: Monday, June 9, 2008  
Time: 9:00 a.m.  
Room: 8, 4th Floor  
Judge: Hon. James Ware

I, the undersigned, hereby certify that I am over the age of eighteen years and not a party to the within action. My business address is 99 Almaden Boulevard, Suite 1000, San Jose, California 95113-1606.

On the date indicated below, I served by mail a true copy of the following document:  
**NOTICE OF MOTION AND MOTION FOR MORE DEFINITE STATEMENT AND TO STRIKE SECOND CAUSE OF ACTION (RULE 12(e), 12(f)); POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR MORE DEFINITE STATEMENT AND TO STRIKE SECOND CAUSE OF ACTION (RULE 12(e), 12(f))**

I am readily familiar with the practice of this business for collection and processing of documents for mailing with the United States Postal Service. Documents so collected and processed are placed for collection and deposit with the United States Postal Service that same

1 day in the ordinary course of business. The above-referenced document(s) were placed in (a)  
2 sealed envelope(s) with postage thereon fully prepaid, addressed to each of the below listed  
3 parties and such envelope(s) was (were) placed for collection and deposit with the United  
4 States Postal Service on the date listed below at San Jose, California.

5 **Attorneys for Plaintiff, FLUKE ELECTRONICS CORPORATION**

6 Bryan M. Barber  
BARBER LAW GROUP  
7 101 California Street, Suite 810  
San Francisco, CA 94111-5802  
8 415-273-2930 P  
9 415-273-2940 F  
bbarber@barberlg.com

10 Executed on April 29, 2008, at San Jose, California. I declare that I am employed in  
11 the office of a member of the bar of this court at whose direction the service was made.  
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13   
14 **DONNA OLSON**  
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